

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

SEABOARD FARMS, INC.,

Plaintiff,

vs.

PORK DATA, INC.,

Defendant.

No. C 00-4031-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING PLAINTIFF'S  
MOTION TO DISMISS COUNT III OF  
DEFENDANT'S COUNTERCLAIM,  
PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO DISMISS, AND  
DEFENDANT'S MOTION TO AMEND  
DEFENDANT'S ANSWER AND  
COUNTERCLAIM**

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**TABLE OF CONTENTS**

<b><i>I. INTRODUCTION</i></b> . . . . .	2
<b><i>II. LEGAL ANALYSIS</i></b> . . . . .	6
<b><i>A. Standards For A Motion To Dismiss</i></b> . . . . .	6
<b><i>B. Pleading Fraud</i></b> . . . . .	7
<b><i>C. Application Of The Standards</i></b> . . . . .	10
1. <i>The original statement of the fraud counterclaim</i> . . . . .	10
2. <i>The amended statement of the fraud counterclaim</i> . . . . .	15
<b><i>III. CONCLUSION</i></b> . . . . .	20

The necessity of pleading fraud with particularity is an issue that appears with surprising frequency in commercial litigation. Despite the frequency with which this court—and, indeed, the Eighth Circuit Court of Appeals—has attempted to clarify the requirements for pleading fraud, there still appear to be misconceptions. This matter comes before the court pursuant to the May 12, 2000, motion of plaintiff Seaboard Farms, Inc., to dismiss Count III of the Counterclaim of defendant Pork Data, Inc., which alleges fraud in the inducement to a contract involving the sale of feeder pigs, on the ground that Pork Data has failed to allege the elements of fraud or to plead fraud with the required particularity. This matter also comes before the court pursuant to Seaboard Farms' July 13, 2000, motion to strike, or in the alternative Seaboard Farms' reply to, Pork Data's memorandum in opposition to Seaboard Farms' motion to dismiss. Finally, this matter comes before the court pursuant to Pork Data's November 21, 2000, motion to amend its Answer and Counterclaim to replead its fraud counterclaim.

### ***I. INTRODUCTION***

Seaboard Farms filed this action on March 22, 2000, in the name of its parent corporation, Seaboard Corporation. However, Seaboard Farms sought leave to amend its Complaint on May 12, 2000, asserting that, through a scrivener's error, the wrong corporate entity had been identified as the plaintiff in this action. On May 17, 2000, the court granted the motion to amend and the plaintiff in this action is therefore Seaboard Farms, Inc.

In its Complaint, as amended, Seaboard Farms asserts a breach-of-contract claim arising from Pork Data's alleged breach of a contract between the parties under which Pork Data was to purchase feeder pigs from Seaboard Farms. More specifically, Seaboard Farms alleges that Pork Data began paying only seventy-four percent of the agreed purchase price for feeder pigs, without explanation or contractual right to a discount, and

consequently has fallen \$285,877.42 in arrears and has accrued \$6,343.24 in late charges. Seaboard Farms seeks payment of all amounts due under the contract, all contractual penalties, costs, and reasonable attorneys' fees resulting from Pork Data's breach of the contract.

In an Answer and Counterclaim filed April 19, 2000,<sup>1</sup> Pork Data denies Seaboard Farms' breach-of-contract claim, and asserts three counterclaims. Count I of Pork Data's Counterclaim asserts breach of contract by Seaboard Farms, alleging that Seaboard Farms breached a prior contract between the parties as a means of coercing Pork Data into agreeing to a new contract with substantially higher prices. Count II of Pork Data's Counterclaim, also a breach-of-contract claim, asserts that Seaboard Farms has breached its contract with Pork Data to deliver feeder pigs in January at 86% of the live price. Count III of the Counterclaim, the adequacy of which is contested in Seaboard Farms' motion to dismiss, alleges fraud in the inducement.

In its motion to dismiss, filed May 12, 2000, Seaboard Farms contends that Count III of Pork Data's Counterclaim must be dismissed, because Pork Data has failed to state a claim for fraud. Instead, Seaboard Farms contends that Pork Data's fraud counterclaim is merely a conclusory allegation "that Plaintiff committed fraud in the inducement and operation of its two contracts," Counterclaim, Count III, ¶ 20, but nowhere in either Count III itself or in the general allegations of the Counterclaim, has Pork Data pleaded any of the required elements of fraud. Moreover, Seaboard Farms contends that Pork Data has failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure and controlling precedent in this circuit and district. Indeed, Seaboard Farms contends that virtually none of the circumstances of the alleged fraud are stated in

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<sup>1</sup>Pork Data's Answer and Counterclaim were filed in response to Seaboard Farms' original Complaint.

the Counterclaim.

In Pork Data's July 3, 2000, resistance to Seaboard Farms' motion to dismiss—which Seaboard Farms challenges as untimely in its July 12, 2000, motion to strike—Pork Data contends that its “notice pleading” of fraud satisfies the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, and that Rule 9(b) must be read in view of Rule 8(a). Even assuming that it is required to plead the circumstances of the alleged fraud, as Seaboard Farms contends, Pork Data argues that it has done so, at least by implication, from the general allegations of the Counterclaim. Pork Data contends that Seaboard Farms has been adequately apprised of the fraud claim against it as well as the factual grounds upon which that claim is based.

In reply, Seaboard Farms reiterates that Pork Data's contention that it need not specifically plead the required elements of fraud under Iowa law in its complaint is simply wrong. Moreover, Seaboard Farms contends that, even if the background allegations contained in Pork Data's Counterclaim are considered, those allegations still fall well short of pleading the elements of the alleged fraud or pleading the circumstances of the alleged fraud with the necessary particularity. Seaboard Farms points out that this court has recognized that Rule 9(b) becomes superfluous if it requires nothing more than the degree of specificity required by “notice pleading” under Rule 8(a). Rather, Seaboard Farms contends, the Eighth Circuit Court of Appeals has specifically held that Rule 9(b) requires pleading of the circumstances of the fraud with particularity. Finally, Seaboard Farms contends that Pork Data's attempts to show that its pleadings satisfy the requirements of Rule 9(b) are fruitless.

The court will deny Seaboard Farms' motion to strike Pork Data's resistance to Seaboard Farms' motion to dismiss, although the court agrees that Pork Data's resistance was untimely and that no extension of time to resist the motion was ever requested. Seaboard Farms took advantage of the opportunity to reply to Pork Data's resistance and,

as the preceding paragraph indicates, Seaboard Farms has had a full and fair opportunity to address any untimely arguments raised by Pork Data. Therefore, no prejudice to Seaboard Farms can be shown from the untimeliness of Pork Data's resistance and the court has considered both Pork Data's belated resistance to the motion to dismiss and Seaboard Farms' reply to that resistance in its disposition of the motion to dismiss.

Long after the issue of the adequacy of its pleading of fraud was joined, Pork Data offered a motion to amend its Answer and Counterclaim on November 21, 2000, in which it seeks to add certain paragraphs to Count III of its Counterclaim. Although Seaboard Farms represents, in a response filed December 4, 2000, that it has no resistance to Pork Data's motion to amend Count III of the Counterclaim, Seaboard Farms contends that the proposed amendment still fails to satisfy the requirements of Rule 9(b) or Rule 12(b)(6). Seaboard Farms points out that, in the seven months since Seaboard Farms first challenged the sufficiency of Pork Data's fraud allegations, Pork Data has done no discovery and has produced no sufficient factual allegations to sustain the claim in the face of Seaboard Farms' motion to dismiss. Seaboard Farms contends further that its alleged "alteration" of the contract, upon which Pork Data's fraud claim is apparently based, allegedly occurred *before* Pork Data ever signed the contract, which, without more, cannot constitute fraud. Therefore, Seaboard Farms contends that the court must dismiss Count III of the Counterclaim, either as originally stated or as amended.

## **II. LEGAL ANALYSIS**

### **A. Standards For A Motion To Dismiss**

The issue on a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is not whether a claimant will ultimately prevail, but whether the claimant is entitled to offer evidence in support of its claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d

1373, 1376 (8th Cir. 1989). In considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint (or defendant's counterclaim) are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999) ("On a motion to dismiss, we review the district court's decision *de novo*, accepting all the factual allegations of the complaint as true and construing them in the light most favorable to [the non-movant]."); *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999) ("We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff."); *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999) (same); *Midwestern Machinery, Inc., v. Northwest Airlines*, 167 F.3d 439, 441 (8th Cir. 1999) (same); *Duffy v. Landberg*, 133 F.3d 1120, 1122 (8th Cir.) (same), *cert. denied*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 62, 142 (1998).

The United States Supreme Court and the Eighth Circuit Court of Appeals have both observed that "a court should grant the motion and dismiss the action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984)); *accord Conley*, 355 U.S. at 45-46 ("A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Thus, "[a] motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculanum*, 44 F.3d 667, 671 (8th Cir. 1995) (internal quotation marks and ellipses omitted). However, special pleading requirements are applicable when a claim or counterclaim is premised on fraud.

## ***B. Pleading Fraud***

This court has articulated the elements of fraud under Iowa law and the standards for pleading fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure in several recent decisions. See *Wright v. Brooke Group, Ltd.*, 114 F. Supp. 2d 797, 832-33 (N.D. Iowa 2000); *Gunderson v. ADM Investor Servs., Inc.*, 85 F. Supp. 2d at 892, 903-905 (N.D. Iowa 2000); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1055 (N.D. Iowa 1999) (elements and pleading); *Brown v. North Cent. F.S., Inc.*, 987 F. Supp. 1150, 1155-57 (N.D. Iowa 1997) (pleading); *Brown v. North Cent. F.S., Inc.*, 173 F.R.D. 658, 664-65 (N.D. Iowa 1997) (pleading); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812 (elements); *North Cent. F.S., Inc. v. Brown*, 951 F. Supp. 1383, 1407-08 (N.D. Iowa 1996) (pleading); *Jones Distrib. Co. v. White Consol. Indus., Inc.*, 943 F. Supp. 1445, 1469 (N.D. Iowa 1996) (elements of fraud and fraudulent non-disclosure); *DeWit v. Firststar Corp.*, 879 F. Supp. 947, 970 (N.D. Iowa 1995) (elements and pleading). Thus, only a brief discussion of these matters is required here.

While Rule 8(a) of the Federal Rules of Civil Procedure requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” Rule 9(b), which pertains specifically to pleading fraud, provides as follows:

**(b) Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b). As this court explained in *DeWit v. Firststar Corp.*, 879 F. Supp. 947, 989 (N.D. Iowa 1995),

Rule 9(b) clearly imposes obligations additional to those stated in *Fed. R. Civ. P. 8*, which establishes notice pleading. *In re GlenFed, Inc., Securities Litigation*, 42 F.3d 1541, 1547 (9th Cir. 1994). The statement of the claim must also aver with particularity the circumstances constituting the fraud. *Id.*

(citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1297, at 615 (1990), which states that Rule 9(b) “is a special pleading requirement and not contrary to the general approach of simplified pleading adopted by the federal rules. . . .”). Rule 9(b) “would clearly be superfluous if its only function were to ensure that defendants are provided with that degree of notice which is already required by Rule 8(a).” *Id.*

*DeWit*, 879 F. Supp. at 989. More recently, the Eighth Circuit Court of Appeals has agreed with this assessment, holding that Rule 9(b) “requires a plaintiff to allege with particularity the facts constituting the fraud.” *Independent Business Forms v. A-M Graphics*, 127 F.3d 698, 703 n.2 (8th Cir. 1997). “When pleading fraud, a plaintiff cannot simply make conclusory allegations.” *Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997).

This court most recently summarized the applicable standards in *Wright v. Brooke Group, Ltd.*, 114 F. Supp. 2d 797 (N.D. Iowa 2000):

In *Commercial Property Inv., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639 (8th Cir. 1995), the Eighth Circuit Court of Appeals explained:

Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” “‘Circumstances’ include such matters as the time, place and content of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.” *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *adhered to on reh'g*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983). Because one of the main purposes of the rule is to facilitate a defendant's ability to respond and to prepare a defense to charges of fraud, *Greenwood v. Dittmer*, 776 F.2d 785, 789 (8th Cir. 1985), conclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule. *In re Flight Transp. Corp. Sec. Litig.*, 593 F. Supp. 612, 620 (D. Minn. 1984).



*Commercial Property*, 61 F.3d at 644; *see Roberts*, 128 F.3d at 651 (noting that factors a court should examine in determining whether the “circumstances” constituting fraud are stated with particularity under Rule 9(b) “include the time, place, and contents of the alleged fraud; the identity of the person allegedly committing fraud; and what was given up or obtained by the alleged fraud.”).

*Wright*, 114 F. Supp. 2d at 832-33; *accord M.B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750, 752-53 (8th Cir. 1999) (“Fraud must be pled with particularity, *see Fed. R. Civ. P. 9(b)*, and they have not alleged facts to support their statements that Franchisor misrepresented the potential profitability of the franchises and the expected increase in the number of JB's franchises, that Franchisor was not telling the truth when it told Rogers another buyer was interested in the store, or that the alleged forgery of Trapper's signature on unspecified documents is in some way tied to the validity of the franchise agreement itself.”); *see generally In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314-15 (8th Cir. 1997) (noting that Rule 9(b) imposes heightened pleading requirements, including a requirement that “the circumstances constituting fraud or mistake shall be stated with particularity,” when a claim is premised on fraud or mistake, and distinguishing such requirements from claims that do not require proof of fraud for recovery, which are governed only by the requirements of Rule 8(a)).

### ***C. Application Of The Standards***

In light of the precedents discussed above, Pork Data’s contention that Rule 9(b) requires it to do no more than present a “short and plain statement” of its fraud claim, as required by Rule 8(a), is simply untenable. *Wright*, 114 F. Supp. 2d at 832; *Gunderson*, 85 F. Supp. 2d at 903; *DeWit*, 879 F. Supp. at 989; *accord NationsMart*, 130 F.3d at 314-15. Instead, Rule 9(b) imposes additional requirements, including the necessity of pleading the “circumstances” of or “facts constituting” the fraud. *Independent Business Forms*, 127

F.3d 703 n.2; *Roberts*, 128 F.3d at 651; *Commercial Property Inv.*, 61 F.3d at 644. Moreover, as shall be explained in more detail below, the allegations of fraud in Count III of Pork Data's Counterclaim, in either its original or amended form, are patently inadequate under the applicable pleading standards.

**1. The original statement of the fraud counterclaim**

Pork Data's original statement of its fraud counterclaim consisted, in its entirety, of the following:

19. Pork Data, Inc. hereby incorporates Paragraphs 1 through 18 as if fully restated herein.
20. That Plaintiff committed fraud in the inducement and operation of its two contracts with Defendant and that as such, Defendants [sic] are entitled to punitive damages.

Answer and Counterclaim, Count III. Plainly, the fraud count itself is no more than a "conclusory statement" of any fraud claim, and as such, is inadequate standing alone. See *Roberts*, 128 F.3d at 651; *Commercial Property*, 61 F.3d at 644; *Wright*, 114 F. Supp. 2d at 832-33; *Gunderson*, 85 F. Supp. 2d at 903; *Brown*, 987 F. Supp. at 1155.

Pork Data points to the paragraphs of general allegations in its Counterclaim, which are referenced in the fraud count, as providing the necessary "particularity." The court notes that paragraphs 1 through 10 appear to be the "answer" to Seaboard Farms' claims, as they contain admissions of paragraphs 1, 2, and 4 of Seaboard Farms' Complaint and denial of all other allegations except as follows: an admission that the parties entered into an agreement, but a denial that the agreement in question is the one attached to Seaboard Farms' Complaint, see Answer, ¶ 4; an assertion that Seaboard Farms altered the agreement, see *id.*, ¶ 5, but with no specification of the nature of the alteration, nor when, how, or by whom the "alteration" was made; an affirmative allegation of acceptance of payments as full and complete, see *id.*, ¶ 6; an affirmative allegation of accord and satisfaction, see *id.*, ¶ 7; a reiteration of fraudulent alteration of the contract in an attempt

to deceive Pork Data, again with no indication of the nature of the alteration, nor when, how, or by whom the “alteration” was made *see id.*, ¶ 8; a denial of breach of contract by Pork Data and an assertion of full performance, *see id.*, ¶ 9; and an allegation that Seaboard Farms materially breached the contract, *see id.*, ¶ 10. More specific factual allegations consist of the following:

12. That during the last week of November, 1999 Seaboard Corporation and Pork Data, Inc., entered into an agreement whereupon [sic] Pork Data, Inc., would purchase 38,000 feeder pigs for a four-week period at a[n] agreed upon price of \$21.00 for a 40-lb. feeder pig.
13. That during the second week of this agreement, Seaboard Corporation unilaterally indicated it would no longer honor its agreement to sell feeder pigs at \$21.00. Pork Data, Inc., in reliance upon the agreement it had entered into with Plaintiff, had entered into contracts to place those feeder pigs with producers. When Plaintiff breached its contract and indicated that it would no longer deliver feeder pigs at the above price, they [sic] did so knowing that Pork Data, Inc. had detrimentally relied upon the agreement.
14. Through the use of coercion Seaboard Corporation then knowing that Pork Data, Inc. had to deliver the feeder pigs it had contracted for, used this to coerce and force Pork Data, Inc. to agree to a new contract with prices ranging between \$27.00 and \$30.00 for the final three weeks of the agreement.
15. That Defendant suffered losses of approximately \$175,000.00 as a result of the above breach of contract.  
\* \* \*
17. That Seaboard Corporation agreed with Pork Data, Inc. for feeder pigs to be delivered during January at 86% of the live price.
18. That Seaboard Corporation breached the above agreement causing Plaintiff’s loss.

Defendant’s Counterclaim. The court notes that paragraphs 12 through 15, quoted above,

appear in support of and as part of Pork Data's "Breach of Contract" Counterclaim, which the court has treated as "Count I" of the Counterclaim, although it is not so designated. Paragraphs 17 and 18, on the other hand, appear as the only additional factual allegations in the part of the Counterclaim denominated "Count II - Breach of Contract."

Pork Data contends that paragraphs 4 and 5 state that Seaboard Farms altered the second agreement in a fraudulent manner in order to deceive Pork Data; that paragraphs 8 through 20 of its Counterclaim set forth the basic facts involved in this action; that paragraphs 11 through 15 discuss the operation and formation of the two contracts; that paragraph 14 alleged that Seaboard Farms knew that Pork Data was relying on the first contract between the parties and used that reliance to force Pork Data to agree to a new, less favorable contract; and that paragraph 20 specifies that the fraud was committed in the inducement and operation of the two contracts. More specifically, as to the "circumstances" of the fraud, Pork Data contends that paragraphs 12 through 14 and paragraph 17 allege a time period for Seaboard Farms' fraudulent actions, starting in November 1999, and continuing through January 2000; that paragraphs 8 and 14 allege the nature of the fraud as Seaboard Farms' alteration and misrepresentation of the contract in an attempt to deceive Pork Data; that paragraphs 8 and 14 set forth the coercive conduct of Seaboard Farms; and that Seaboard Farms, a person under the law, is identified throughout as the party engaged in the fraudulent conduct, and that paragraph 15 sets forth Pork Data's losses as a result of the fraudulent inducement and operation of the contract.

The additional allegations pointed out by Pork Data, however, fail to provide the necessary articulation of the "circumstances" of the alleged fraud. Again, what is required is factual allegation of matters including time, place, and content of false representations, and the identity of the person making those misrepresentations, and what was obtained or given up thereby. See *Roberts*, 128 F.3d at 651; *Commercial Property Inv.*, 61 F.3d at 644; *Wright*, 114 F. Supp. 2d at 832-33; accord *M.B. Restaurants, Inc.*, 183 F.3d at 752-53

(noting the absence of factual allegations of the specific nature of the misrepresentation, the falsity of the misrepresentation, or that the alleged forgery was in some way tied to the validity of the contract at issue). Even supposing that the wide time period during which the Counterclaim alleges that misconduct occurred sufficed as an allegation of the “time” of the fraud, which the court doubts, the factual allegations of the Counterclaim—even taken all together and construed remarkably liberally, see *Conley*, 355 U.S. 41, 45-46—do *not* allege the other “circumstances” of the fraud. First, the court has considerable doubt that identification of a corporation, rather than one of its agents, as the “person” who allegedly committed the fraud will suffice, although the court acknowledges that what persons within a corporation actually handled a document in the course of its preparation may be a matter distinctly and solely within the knowledge of the counterclaim defendant. Pork Data has not even identified any of the agents of Seaboard Farms with whom it dealt in the negotiation of the contract and the circumstances under which Pork Data’s agents and Seaboard Farms’ agents purportedly reached an agreement on language that is not reflected in the agreement actually presented to Pork Data for signature. Plainly, however, there is no indication of any “place” at which Seaboard Farms made a representation about the language of the contract that was contrary to the actual language of the contract. Most critically, the fraud Counterclaim fails to allege adequately the “contents” of the alleged fraud, either as to the difference between some agreed language and the purportedly “altered” language of the agreement actually presented, or the manner in which the contractual language was “altered.”

Thus, Pork Data’s original statement of its fraud counterclaim does not satisfy the pleading requirements of Rule 9(b) and Eighth Circuit precedent. Because these shortcomings are sufficient basis to grant Seaboard Farms’ motion to dismiss Count III of the Counterclaim, at least as originally formulated, the court need not consider Seaboard Farms’ further contention that, even if the “circumstances” of the fraud have been

adequately alleged, Pork Data was required, and has failed, to plead the elements of fraud under Iowa law, and thus the fraud counterclaim fails to state a claim upon which relief can be granted.

**2.     *The amended statement of the fraud counterclaim***

The court therefore turns to the question of whether Pork Data's proffered amendment of the fraud counterclaim cures the ills identified in the original statement of that claim. Although Seaboard Farms represents that it does not resist Pork Data's motion to amend Count III of its Counterclaim, the court nonetheless finds that the amendment is inadequate, and therefore subject to denial, under Local Rule 15.1. Local Rule 15.1 provides as follows:

**LR 15.1 MOTIONS TO AMEND PLEADINGS**

The motion to amend a pleading shall specifically state in the motion what changes are sought by the amendment. *Any party submitting a motion to amend shall attach to the motion the original of the proposed amended and substituted pleading. Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must, except by leave of court, reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference.* If the motion is granted, the clerk shall then detach the amended and substituted pleading and file it when the order granting the motion to amend is filed.

N.D. IA. L.R. 15.1 (emphasis added). In this case, Pork Data merely presented a "Motion To Amend Defendant's Answer And Counterclaim," which seeks to amend Count III of the Counterclaim by adding several paragraphs. Thus, Pork Data may have "state[d] what changes are sought by the amendment," *id.*, but it has failed to "attach to the motion the original of the proposed amended and substituted pleading," and instead, without leave of court, improperly "incorporate[s] [the] prior pleading by reference." *Id.*

Nevertheless, the court will consider the sufficiency of the proposed amendment to Count III of the Counterclaim, because Seaboard Farms does not contest the amendment,

Seaboard Farms has had a full and fair opportunity to contest the adequacy of the amendment to satisfy the requirements of Rule 12(b)(6) and 9(b) for stating a fraud claim, and, assuming leave to amend should otherwise be granted, the court finds that Seaboard Farms will not be prejudiced by the amendment, because the amended counterclaim is also inadequate. *But see Foman v. Davis*, 371 U.S. 178, 182 (1962) (permitting a court to deny leave to amend pursuant to Rule 15 of the Federal Rules of Civil Procedure owing to the “futility” of the amendment).<sup>2</sup> Therefore, Pork Data’s November 21, 2000, motion to amend its Answer and Counterclaim to replead its fraud counterclaim will be granted.

As to the adequacy of the amendment to plead fraud as required by Rule 9(b), the court’s analysis begins with a statement of the additional allegations. Paragraphs 19 and 20 of the original fraud counterclaim, as quoted above, have been retained, and new paragraph 21 is only a paraphrase or inexact repetition of paragraph 20, adding no additional allegations.<sup>3</sup> The *additional* factual allegations consist of the following:

22. That the parties specifically agreed to a purchase price equal to 86% of the CME board [price?] converted to a

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<sup>2</sup>The court is not ordinarily sympathetic, however, to amendments proffered to cure deficiencies identified by the opposing party when the proposed amendment is only offered several months after the adequacy of the original statement of a claim has been challenged, instead of promptly after inadequacies have been identified, because of the potential for prejudice to the opposing party that might arise from allowing an amending party repeated bites at the apple after that party has appeared to rest upon its original pleadings.

<sup>3</sup>New paragraph 21 states of the following:

21. That Plaintiff committed fraud in the inducement operation [sic] of its two contracts with *the* Defendant and that as such, Defendants [sic] are entitled to punitive damages.

Counterclaim, Count III (emphasis added). Thus, paragraph 21 differs from paragraph 20 in that the “and” between “inducement” and “operation” has been omitted and the word “the” has been inserted prior to “Defendant.” As in paragraph 20, the final clause of paragraph 21 still refers to plural “defendants” when only one defendant, Pork Data, Inc., has ever been named in this action.

live price. Pork Data, Inc. had forwarded a contract outlining 84% of the CME board converted to a live price to Seaboard. Seaboard and Pork Data, Inc. orally agreed to change that contract to read 86% of CME board converted to a live price.

23. That Plaintiff fraudulently changed the ultimate feeder purchase agreement which was signed and dated December 15, 1999 by indicating 86% of closing price for June 2000 CME lean futures contract on date of delivery knowing that the parties had specifically agreed to 86% of the closing price on futures converted to live.

24. That Seaboard intentionally and fraudulently changed the agreement of the parties by not inserting the term “converted to live” with the intent to commit fraud upon Defendant.

Amended Count III of Counterclaim.

Although Pork Data offers no further argument in support of the sufficiency of this proffered amendment to satisfy the requirements of Rule 9(b), nor even any argument in support of leave to amend, Seaboard Farms asserts, in its December 4, 2000, response to Pork Data’s motion for leave to amend, that the proposed amendment is still inadequate. Specifically, Seaboard Farms contends that the proposed amendment still does not contain an allegation as to who made the alleged alteration, where the alleged alteration was made, or the date and time of the alleged alteration. Moreover, Seaboard Farms contends, the proposed amendment seems to be alleging that the “alteration” was made before Pork Data ever signed the contract, which, without more, cannot constitute fraud.

The court concludes that the fraud counterclaim, as amended, is still insufficient. Nothing in the amended counterclaim addresses the deficiencies of the original counterclaim in the pleading of the “identity” of the fraudulent actor, or the “time” and “place” of the alleged fraud. The court acknowledges that what it concluded was the “most critical” flaw in the original fraud counterclaim, the absence of any adequate allegation of the “content” of the fraud, has been addressed in the amended counterclaim, although, the court finds, not



entirely adequately. See *Roberts*, 128 F.3d at 651 (requiring pleading of “circumstances” of the fraud, including “content” of the fraud); *Commercial Property Inv.*, 61 F.3d at 644; *Wright*, 114 F. Supp. 2d at 832-33. One way to read paragraph 23 of Pork Data’s amended fraud counterclaim is that the counterclaim is premised on a difference between the language to which the parties purportedly agreed orally and what was subsequently included in the final written version of the agreement that the parties signed. This is the interpretation of the language Seaboard Farms apparently ascribes to the amended complaint, because Seaboard Farms asserts that a mistake in the language of the contract that occurred prior to the signing of the contract cannot, standing alone, constitute fraud. However, paragraph 23 of the amended counterclaim is, at best, inartful, and at worst, fails to provide adequate notice of the nature of the fraud, because it can also reasonably be read as an allegation that the “ultimate feeder purchase agreement which was signed and dated December 15, 1999,” was *subsequently* “changed . . . by indicating 86% of closing price for June 2000 CME lean futures contract on date of delivery,” when “the parties had specifically agreed to 86% of the closing price on futures converted to live,” *i.e.*, that a forged or altered document has been substituted for the original, signed agreement, which properly reflected the oral agreement of the parties, and that Seaboard Farms is attempting to enforce that fraudulent document. Thus, the amended counterclaim still does not plead the “content” of the alleged fraud in such a way that it will “facilitate [Seaboard Farms’] ability to respond and to prepare a defense to charges of fraud.” *Commercial Property*, 61 F.3d at 644 (identifying this facilitation of response as “one of the main purposes” of Rule 9(b)).

Moreover, the court concludes that the deficiency in the amended counterclaim includes failure to allege adequately the “scienter” element of fraud, or to allege the “circumstances” in such a way that necessary “scienter” can be inferred. This court has recognized that “[s]cienter may, within limits, be pleaded in conclusory fashion.” See

*DeWit*, 879 F. Supp. at 989. However, “conclusory allegations that a defendant’s conduct was fraudulent and deceptive are not sufficient to satisfy the rule,” *Commercial Property*, 61 F.2d at 644; *see also Wright*, 114 F. Supp. at 832-33 (quoting *Commercial Property*), and Pork Data has alleged nothing more. “‘Consistent with *Fed. R. Civ. P.* 9(b), the complaint must set forth specific facts that make it reasonable to believe that defendant[s] knew that a statement was materially false or misleading.’” *DeWit*, 879 F. Supp. at 989 (quoting *Lucia v. Prospect Street High Income Portfolio, Inc.*, 36 F.3d 170, 174 (1st Cir. 1994)). Pork Data’s amended counterclaim baldly asserts that the purported alteration to the contract terms was “intentional” and “fraudulent,” *see* Amended Counterclaim, Count III, ¶ 24, but the court finds no “specific facts” alleged that suggest anything other than a mutual mistake about the pricing agreement or the extent to which the parties’ oral agreement on pricing was reflected in the final form of the written agreement. Certainly, Pork Data has not alleged that it possesses a form of the signed contract stating different pricing terms, which would make it reasonable to believe that the signed document was fraudulently altered by Seaboard Farms. This court cannot conclude that a mere difference between what one party contends was the content of an oral agreement and what is reflected in a written embodiment of that agreement necessarily gives rise to an inference of fraudulent intent.

Therefore, even considering the amended counterclaim, the court concludes that Pork Data’s fraud counterclaim must be dismissed for failure to plead fraud with the necessary particularity and failure to state a claim upon which relief can be granted.

### ***III. CONCLUSION***

Pork Data has failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure and has failed to state a claim of fraud upon which relief can be granted in Count III of its Counterclaim, either as originally stated or as amended

on November 21, 2000. Therefore,

1. Pork Data's November 21, 2000, motion to amend its Answer and Counterclaim to replead its fraud counterclaim is **granted**.

2. Seaboard Farms' July 13, 2000, motion to strike, or in the alternative Seaboard Farms' reply to, Pork Data's memorandum in opposition to Seaboard Farms' motion to dismiss is **denied**, to the extent that the court will not strike Pork Data's belated response to the motion to dismiss, but **granted** to the extent that the court has considered Seaboard Farms' alternative reply in support of its motion to dismiss.

3. Seaboard Farms' May 12, 2000, motion to dismiss Count III of the Counterclaim of defendant Pork Data, Inc., is **granted**, as to both the original statement of the counterclaim and the amended version, and Count III of the Counterclaim, as originally stated and as amended, is **dismissed**.

**IT IS SO ORDERED.**

**DATED** this 11th day of December, 2000.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA